In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BALTIMORE & OHIO RAILROAD COMPANY, appellant,
v.
THE UNITED STATES.
No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Previous to the summer of 1917 appellant had made surveys in Maryland for a railroad known as the Marley Neck Branch, to extend along the west side of Curtis Creek, from a point on appellant's Curtis Bay Branch near the Standard Guano Plant, in Baltimore, to Thomas Point; thence crossing Curtis Creek at Thomas Point on a bridge; thence from the bridge in a southwesterly direction to Magothy River. Marley Neck Branch was projected for the purpose of developing the territory in the valley of Curtis Creek along the west shore of Patapsco River.

Late in the summer of 1917 the War Department constructed an Ordnance Depot between Curtis Creek

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and Back Creek. The line location of the Marley Neck Branch passed directly through the location of the Ordnance Depot. It is alleged that on this account, the United States insisted that the line of the Marley Neck Branch be changed in order that it pass along one of the sides of the Ordnance Depot location and not directly through the center thereof. To comply with this request, appellant *decided* to locate the crossing of the Marley Neck Branch over Curtis Creek at Stahl's Point, instead of Thomas Point. The surveys for the relocation were not completed until sometime in November, 1917.

On September 25, 1917, while these surveys and the relocation were taking place, appellant contracted with McLean Contracting Company on a unit-price basis for the construction of the portion of the new line of the Marley Neck Branch from a point on appellant's Curtis Bay Branch near Standard Guano Plant to a point adjacent to the site of the Ordnance Depot between Curtis Creek and Back Creek.

The surveys with respect to the relocation of the Marley Neck Branch were still being made at the time of the letting of the contract by appellant to McLean Company. The final location of the Marley Neck Branch in the vicinity of Curtis Creek Crossing was not definitely determined until a later date. It is alleged that for these reasons the McLean Company was unable to begin its operations on the Marley Neck Branch south of Cabin Branch until November 16, 1917.

By its terms, McLean Company was required to complete its contract with appellant on or before December 25, 1917. It is alleged that but by reason of the delay for which appellant was not responsible, appellant would have extended the time of McLean Company for completing the contract to at least February 25, 1918; and because the construction had to be done in the winter months, through no fault of the contractor, appellant would no doubt have had to extend the time to even a later date.

Early in December, 1917, it had become apparent to the officers of the War Department that the construction of the Marley Neck Branch would be delayed to such an extent that operations at the Ordnance Depot would be seriously delayed. On December 15, 1917, and subsequent thereto, the Army officers insisted that the Marley Neck Branch be completed at the earliest possible date, as emphasized by letter of December 15, 1917, which follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, D. C. December 15, 1917.

No. 617 CR–E (Curtis Bay).

From: Officer in charge of Cantonment Construction.

To: Mr. M. H. Cahill, General Superintendent, B. & O. R. R. Co., Baltimore, Md.

Subject: Curtis Bay Track Facilities.

1. Confirming conversation with your chief clerk today, will state that we are ex-

exceedingly anxious for you to get your branch line now under construction, extended to our Curtis Bay Ordnance Depot. Since the original plans were made, we have added to this layout two (2) very large warehouses which will mean a great increase in the amount of freight to be handled through this terminal. It is very urgent that we have track facilities both for handling construction material and freight at the earliest possible moment. It seems to us from observation on the ground that our operations are going to be very seriously hampered by lack of track facilities unless your company is able to greatly increase progress being made on construction at this branch.

2. If you desire, I should be pleased to meet you on the ground and go over this matter at an early date.

3. Please address your reply to the personal attention of Mr. R. M. White.

By authority of the Secretary of War.

I. W. LITTELL,
Brigadier General, Q. M. Corps, N. A.,
In Charge of Cantonment Construction,
By F. M. GUNBY,
Major, Quartermaster, R. C.

F. M. G. R. M. W. E. D.

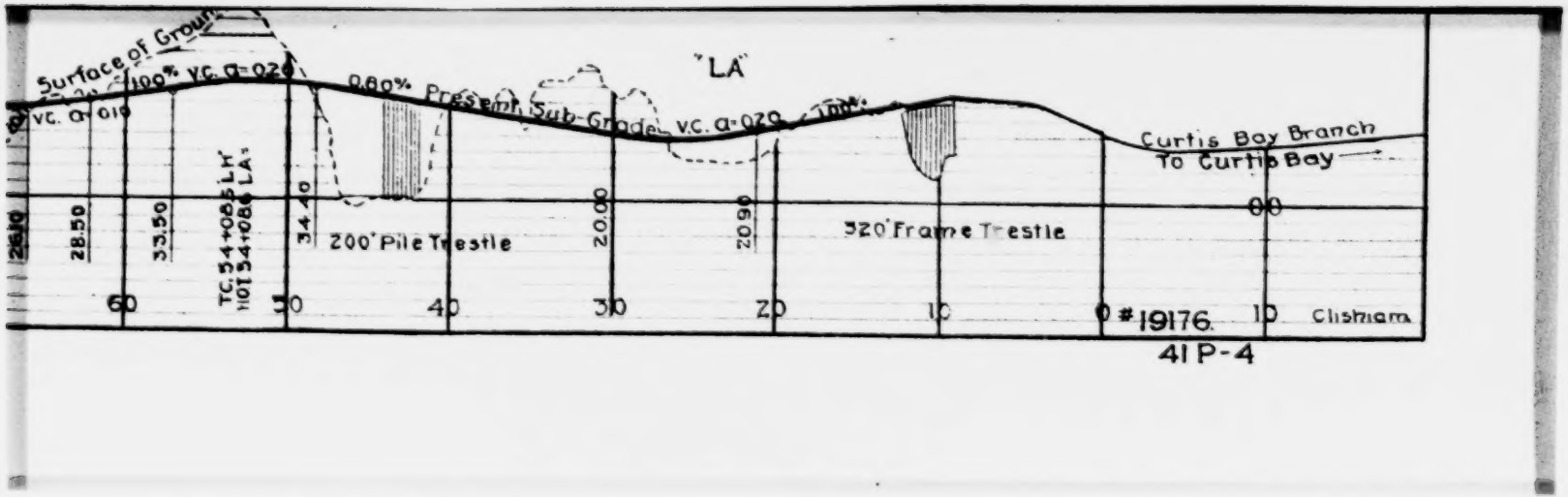
It is then alleged that in order to meet the urgent needs of the United States, it became necessary for appellant to cancel the contract with McLean Company for the construction of the Marley Neck Branch on the unit-price basis and contract with another upon a cost-plus basis to expedite the construction.

It is further alleged that appellant "on January 5, 1918, therefore, *determined* to cancel the unit-price contract it had" (Tr. 4) with the McLean Company for the construction of the Marley Neck Branch and "did cancel said contract"; that on January 5, 1918, a contract was entered into between appellant and Empire Engineering Company to complete the work of construction on a cost-plus basis and the Empire Company commenced work on January 6, 1918, and completed the construction in the latter part of February, 1918.

It is further alleged that in order to abrogate its contract with the McLean Company appellant was required to pay for all the construction by that company to January 6, 1918, on a cost-plus basis and no payment was made to that company on a unit-price basis as provided in its contract.

Conferences between the officers of appellant and the Army officers are referred to in general terms, the substance of which is that the latter requested that the Marley Neck Branch be constructed as quickly as possible and that the engineering department of appellant speed up the work so as to render every assistance to the United States during the emergency that then existed.

The construction was finished in February, 1918. On June 27, 1919, sixteen months later, appellant, under the provisions of the Act of March 2, 1919 (40 Stat. 1272), presented to the War Department its claim of $9,058.55. The Government not "having heard the first time", appellant, on April


"LA"
Surface of Ground
100% V.C. a-020
0.80% Present Sub-Grade V.C. a-020 100'
V.C. a-010
TC. 34+085 Lft
LOT 34+086 LA
28.50
33.50
34.40
200' Pile Trestle
20.00
20.90
320' Frame Trestle
Curtis Bay Branch
To Curtis Bay
60
50
40
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2, 1920, or nine months after the foregoing claim was presented to the War Department, amended the claim and the amount was increased to $85,474.06, for which judgment is now claimed, as the excess cost of construction of the Marley Neck Branch.

The War Department rejected the claim *in toto*. Suit was then filed. The Court of Claims dismissed the petition on demurrer on the ground that "no agreement can be inferred from them (the facts alleged) which obligates the United States to pay the money claimed to be due." (Tr. 14.)

II.

ARGUMENT.

The Court will take judicial notice that during the period covered by the transactions the United States was at war with the Imperial German Government.

On March 2, 1919, the act entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes" (40 Stat. 1272), and commonly known as the Dent Act, was passed. Section 1 provides:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition

> of lands, or for the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law.

The Court will take judicial notice that the Baltimore & Ohio Railroad Company operates a large trunk line railroad.

It is not alleged or argued that it had any express contract with the Government for either the construction or relocation of the Marley Neck Branch. Nor is it alleged or argued that in the relocation and construction the officers of appellant were under any domination or duress on the part of the Army officers.

The simple facts are that the appellant had located the railroad, and while conferences were taking place between officers of appellant and the Army officers, appellant let the contract to the McLean Company on the unit-price basis. The Army officers "insisted" that the line be changed in order that it would pass along one of the sides of the proposed depot and not directly through the center.

Certainly that was not a contract, either express or implied, on the part of the United States to pay appellant for the relocation and construction. Obviously the appellant was to be the carrier of large consignments of traffic, and it is not unreasonable to assume that appellant and its officers were willing to conform to any reasonable suggestions on the part of the Army officers for the location of the track over which was to move the Government's traffic "which will mean a great increase in the amount of freight to be handled through this terminal." (Tr. 3.)

Nor did the fact that the Army officers "did urge the engineering department of your petitioner to speed up the work of construction in every possible way so as to render every assistance to the United States during the emergency that then existed" (Tr. 5) create a contract, either express or implied, that the United States was to pay appellant for the construction.

The cancellation of the contract of McLean Company on the unit-price basis and the re-letting of the work to the Empire Company on the cost-plus basis, and the subsequent settlement with the McLean Company on the cost-plus basis instead of the unit-price basis under its contract, were also matters with which none of the Army officers had anything whatever to do. The Army officers merely conferred in the most courteous and friendly manner with the officers of the Baltimore & Ohio to the end that the latter might expedite the construction of the Marley Neck Branch.

There is not a single syllable anywhere in the entire record which in any way tends to indicate that either the appellant or the Army officers ever considered that a contract, either express or implied, was being negotiated between the company and the Government by which the latter was to pay for that construction.

If the position of appellant is sound, then any person, firm, or corporation in the United States, or elsewhere, who expanded its facilities for the purpose of selling either transportation service or goods, wares, or merchandise to the Government, that the latter might prosecute the war, could thereafter hold the Government not only for the price of the service or material, as the Baltimore & Ohio undoubtedly collected its freight charges for all the traffic it moved, but likewise the cost of the facilities as well.

It must not be overlooked that the construction of the Marley Neck Branch was contemplated "for the purpose of developing the territory in the valley of Curtis Creek" before the Ordnance Depot was located. (Tr. 2) It was merely for the relocation of the track to facilitate the loading and unloading of the traffic that the claim is made.

In its petition appellant alleges that it "*decided* to locate the crossing" of its railroad over Curtis Creek at Stahl's Point instead of Thomas Point (Tr. 2). Thus the appellant itself had voluntarily assumed the work. The simple fact that the Army officers urged appellant to complete the work, not

only because of the urgent needs of the United States, but because of the increased freight business which would result by such completion, does not support an agreement on the part of the Government to pay for the construction. The Court of Claims correctly gauged the case in the following words (Tr. 14):

> It is not necessary to set out in this opinion these facts which are recited in full in the petition. Suffice ito say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court can not give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay. The demurrer of the defendant is therefore sustained, and the petition of the plaintiff is dismissed.

Instead of holding the Government liable in such a way for their conduct, the officers of the Army should be highly commended for urging appellant to speed up the construction of the Marley Neck Branch to the end that the volume of appellant's own traffic might be increased and the war against Germany might be the more vigorously prosecuted. With that one would suppose that the appellant

would also be satisfied. However, it retains and owns the railroad, it acquired the increased volume of traffic, and it now seeks a large sum in addition to both.

The judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

February, 1923

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